Supreme Court, U.S.
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No. 96-1472

In The

Supreme Court of the United States

October Term, 1996

FRANK HOLT,

Petitioner,

vs.

JTM INDUSTRIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

The sole question presented is:

> Whether an individual, whose relative has filed a charge of discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), can sue for retaliation when he or she has not engaged in any conduct identified by the ADEA as protected?

CERTIFICATE OF INTERESTED PARTIES PURSUANT TO RULE 29.6

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case.

1. Counsel. Petitioner has properly identified: Petitioner's counsel, J. PATRICK ATKINS, Esq., PHILLIP McCLEERY, Esq., and the law firm of SHEEHY, LOVELACE & MAYFIELD, P.C., Waco, Texas; Respondent's counsel of record, LIONEL M. SCHOOLER, Esq., and the law firm of GILPIN, PAXSON & BERSCH, L.L.P., Houston, Texas; and Respondent's local counsel at the time of trial, DAVID G. TEKELL, Esq., and the law firm of NAMAN, HOWELL, SMITH & LEE, P.C., Waco, Texas. Mr. LAWRENCE BESNOFF, Esq., and the law firm of OBERMAYER, REBMANN, MAXWELL & HIPPEL, Philadelphia, Pennsylvania, are of counsel to Respondent.

2. Parties/Party Representatives. Petitioner has properly identified Petitioner FRANK HOLT and his wife, LINDA HOLT.

   JTM INDUSTRIES, INC. ("JTM Industries" or "JTM") is a Georgia corporation, with its principal place of business in Kennesaw, Georgia. The chief executive officer of JTM Industries is Bill Fletcher, Kennesaw, Georgia; the Executive Vice President of JTM

Industries at the time of the events in question was Dennis Kinder, Kennesaw, Georgia; the Region Manager for the South Central Region of JTM Industries at the time of the events in question was Charles Anderson, Sugarland, Texas.

At the time of the lawsuit, JTM Industries was a wholly owned subsidiary of USPCI, Inc. (correctly identified as an acronym for "United States Pollution Control, Inc."), which was then a Texas corporation with its principal place of business in Houston, Texas. The Director of Human Resources at USPCI at the time of the events in question was Deborah Estrin; the general counsel of USPCI at the time of the events in question was Rick Walton, Esq. USPCI has been properly identified as a subsidiary of UNION PACIFIC CORPORATION.

JTM Industries is presently a wholly owned subsidiary of LAIDLAW ENVIRONMENTAL SERVICES, INC., a South Carolina corporation ("Laidlaw"), with its principal place of business in Columbia, South Carolina. The Director of Human Resources of Laidlaw is Nick Hiller.

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No. 96-1472

In The
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FRANK HOLT,

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JTM INDUSTRIES, INC.,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent JTM Industries opposes the petition for writ of certiorari ("Petition") filed by Petitioner Frank Holt to review the judgment of the United States Court of Appeals for the Fifth Circuit. There is no conflict among the circuits on the question presented. The Court of Appeals correctly interpreted the applicable statute in its ruling. Respondent thus requests that this Court deny the Petition.

OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISION INVOLVED

The Petition properly identifies the opinions and judgment below and this Court's jurisdiction pursuant to *28 U.S.C. §1254(1)*. The Petition also sets forth the one pertinent statutory provision, the "anti-retaliation" portion of the ADEA, *29 U.S.C. §623(d)*.[1]

COUNTER-STATEMENT OF THE CASE

INTRODUCTION

The United States Court of Appeals for the Fifth Circuit properly reversed the judgment of the District Court and correctly held that Petitioner Frank Holt lacked standing to assert a claim of retaliation under the ADEA on the facts of this case. There is, therefore, nothing about this case worthy of review. Petitioner seeks in the Petition to summon to his aid the resources of this Court to protect him, when he himself took none of the rudimentary steps available to take advantage of statutorily protected rights created by Section 623(d). The petition for writ of certiorari should therefore be denied.[2]

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[1] For reasons set forth in the Statement of the Case below, the anti-retaliation provision of Title VII of the 1964 Civil Rights Act, *42 U.S.C. §2000e-3(a)*, also cited by Petitioner, is not at issue in this case.

[2] To the extent references are necessary to aid this Court in its evaluation of the petition, references to the Record on Appeal are designated as "*R.* ____"; references to the transcript of testimony prepared from the trial of this lawsuit are designated as "*Tr.* ____"; references to exhibits introduced at trial are designated as "*DX-*_____" (JTM Exhibits) or as "*PX-*_____" (Holt Exhibits).

The Petition adequately describes the business of JTM, but significantly understates the importance to JTM of its business relationship with its primary client in that area, Houston Lighting & Power Co. ("HL&P"), at its facility in Jewett, Limestone County, Texas, known as the "Limestone Facility" or "Limestone Plant". The Limestone Plant primarily serves HL&P's disposal needs emanating from its electrical generating facility across the road from the Limestone Plant. Satisfying HL&P's needs determines whether JTM's operation of the Limestone Facility can succeed financially.

The Petition accurately describes Frank Holt's tenure at the Limestone Facility between 1985 and 1993, but misleadingly creates the impression that Mr. Holt's tenure was problem-free. To present the proper context within which this case exists, including the significant evidence submitted at trial which demonstrated the long-standing and persistent job performance problems with Mr. Holt and the absence of evidence regarding retaliatory intent, Respondent is obliged to submit the following information.

JOB PERFORMANCE OF FRANK HOLT

Problems with Mr. Holt's job performance as Plant Manager date back to 1987. *Tr. 194-96; 199*; *PX-11(a)* (1988 Evaluation of Mr. Holt by Lou Marcuz).[3] The durability of these problems was such that Mr. Holt received no bonuses and no pay raises from JTM after 1990.

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[3] Mr. Marcuz was particularly concerned about Mr. Holt's inability to delegate responsibility to others. ("**Direction and Leadership**. Delegates but funnels everything through himself. Seems reticent to allow others full responsibility.") *PX-11(a)*.

In the fall of 1991, Mr. Holt's supervisor, Charles E. Anderson, prepared a job performance evaluation of Mr. Holt (proven up at trial by Mr. Holt's own exhibit 11(e), *PX-11(e)*), which rated him "poor" in several categories, including leadership skills, training of personnel, communications with and delegation of responsibility to supervisors, and communications with employees. *Tr. 196-97*; *697-700*. Mr. Bill Fletcher, President of JTM, also communicated directly with Mr. Holt concerning persistent problems with Mr. Holt's job performance. *Tr. 765*; *785*. In the fall of 1992, a different supervisor, Mr. William Gehrmann, prepared a job evaluation regarding Mr. Holt's performance which again rated him "poor" in the same categories identified the year before by Mr. Anderson -- leadership, training, and communications. *Tr. 197-98*; *701-02*. Pursuant to an annual program of "bonus evaluations" utilized by JTM, Mr. Anderson evaluated the performance of Mr. Holt during the first three calendar quarters of 1992, and determined each time that, because of deficiencies in job performance, Mr. Holt would not be eligible for any bonus. *Tr. 280-86*; *702*; *DX-16, DX-17 and DX-18*.[4]

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[4] Anecdotal evidence introduced at the trial substantiated the counter-productive impact of the tight-fisted style Mr. Holt wielded as Plant Manager. Mr. Dan Hohmann, who served under Mr. Holt as the Engineering Technician and Foreman at the Limestone Facility, testified regarding Mr. Holt's deleterious supervisory approach and treatment of employees. For example, Mr. Hohmann indicated that Mr. Holt controlled every aspect of Mr. Hohmann's job duties, even though he (Mr. Hohmann) was supposed to supervise other workers -- even to the point of Mr. Holt's requiring Mr. Hohmann to obtain Mr. Holt's approval before being permitted to purchase $60 worth of respirators to aid workers exposed to excess dust in their daily jobs. *Tr. 499-500*. Similarly, heavy equipment, whose uninterrupted and intact operation was crucial to JTM's landfill activities, was supposed to be serviced after every 250 hours of operation. Mr. Holt deferred maintenance until 500 hours of operation, *Tr. 501-03*,

(continued...)

Documentary and anecdotal evidence introduced at trial also revealed problems Mr. Holt caused with JTM's primary customer at the Limestone Facility, HL&P. HL&P made known to JTM on several occasions its dissatisfaction with JTM's performance under the applicable contract. *DX-6 at 103; Tr. 376-77.* Indeed, an HL&P employee who testified for Mr. Holt at trial, acknowledged that he himself complained to other JTM representatives about Mr. Holt's job performance; and also acknowledged that Mr. Holt's frequent complaints to HL&P representatives about his (Mr. Holt's) treatment by his supervisors likely detracted from JTM's relationship with HL&P. *Tr. 256; 263-64; DX-7 @ 43.*

Mr. Holt's poor job performance and his "me against them" attitude towards JTM management persisted into 1993. Mr. Holt's 1st quarter bonus evaluation in 1993 was again below standard, and he did not qualify for a bonus as a result. *Tr. 703; DX-32.* At JTM's annual meeting of managers in February, 1993, Mr. Holt was counselled by Bill Fletcher, JTM's President, and by Dennis Kinder, JTM's Executive Vice President, about problems which headquarters was experiencing with the Limestone Facility. *Tr. 539-41.* In addition to this, Mr. Anderson became aware, in the Spring of 1993, of significant deficiencies in Mr. Holt's maintenance of JTM vehicles at the Limestone Facility, to the point where some of the vehicles had even become dangerous to operate. *Tr. 675.*

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[4](...continued)
contributing to major maintenance problems later uncovered by Mr. Anderson in 1993, as described below.

On May 19, 1993, before JTM could have been notified about the Charge of Discrimination in question, Mr. Holt and Mr. Anderson had a confrontation about Mr. Holt's counter-productive attitude following a meeting between HL&P and JTM over problems at the Limestone Plant. *DX-7 @ 59; Tr. 268-69.* Following this confrontation, in early June, 1993, Mr. Anderson learned that Mr. Holt had disclosed confidential, proprietary company information to unauthorized third parties. *Tr. 749.* At the time, Mr. Holt was subject to the requirements of a confidentiality agreement he had signed in October, 1989. Contemporaneously, JTM management learned from the HL&P Manager of its Limestone Facility (Terry Gish) that Mr. Holt had visited Mr. Gish in early June, 1993, for the express purpose of encouraging HL&P to dissolve the existing contract between HL&P and JTM and establish with the former owners of JTM a new contract for ash disposal at the Limestone Facility, with Mr. Holt as the person in charge of the operation. *Tr. 252; 384; 656-58; 693-94.*

The documentary and anecdotal evidence from the trial, much of it from Mr. Holt's own lips or pen, thus indicates that Mr. Holt considered himself immune from obeisance to company loyalty and commitment to company goals and discipline. It is against this backdrop that this Court should consider Mr. Holt's Petition.

LINDA HOLT'S FILING OF A CHARGE OF DISCRIMINATION

The Petition addresses the dates of certain events culminating in Linda Holt's filing of the Charge, but significantly understates the length of time (seven months) during which, and the context within which, Mrs. Holt's

departure from the company was under discussion.[5]

Linda Holt was employed as the Office Manager of the Limestone Facility, reporting to Mr. Holt, and she held this position until March 31, 1993, when her employment concluded following JTM's institution on or about September 1, 1992, of a company-wide "anti-nepotism" policy (*i.e.*, employees related to each other by blood or marriage could not report one to the other.) *DX-21.* This policy affected several different JTM employees, including the Holts. When the policy was announced, JTM notified the Holts that the new policy would affect them, and requested that they notify the company as promptly as possible of their decision concerning which of them would remain employed at the Limestone Facility. During September, 1992, several conversations occurred between the Holts and Mr. Fletcher, JTM's President, concerning the various options available to them in response to this new policy, including transferring back to the Holts' home state of Georgia, or to a nearby JTM facility in Florida, to work at neighboring facilities, or for one to remain at Limestone and the other transfer to another JTM facility in Texas. *R. 102-22.*

Mr. Holt admitted at trial that he had often expressed previously to Mr. Fletcher the desire to re-locate to Georgia, and recorded in his personal diary these efforts to re-locate.

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[5] During these seven months, Mr. Holt had the opportunity to engage, but did not engage, in any statutorily protected conduct concerning the circumstances of the conclusion of his wife's employment.

DX-1 @ 37-39; Tr. 207; DX-7 @ 16; Tr. 249.[6] Mr. Holt's own written words therefore indicated that he actually perceived a transfer to another JTM facility in the southeast United States as a positive step for him, and not an "adverse" employment move, because it would remove him from a chain of command he disliked (i.e., reporting to Mr. Anderson and Mr. Gehrmann).

The Holts decided that they wanted Mr. Holt to remain employed at the Limestone Plant, for the time being, and they wanted Mrs. Holt to transfer to another location in Texas. While the original policy called for Mrs. Holt to relocate promptly, in fact she was permitted by JTM to remain employed at Limestone until March 31, 1993. Mrs. Holt posted for available positions at USPCI. She was offered the opportunity to work at two JTM facilities in Texas, but declined these opportunities. She also applied for a position at a third JTM Facility, but she was not selected for that position because she was not the best qualified applicant, nor did she express any real interest or enthusiasm for that job. Her relatively inferior computer skills, her lack of experience in customer relationships and her lack of experience in telephone etiquette in dealing with prospective customers dictated that she was less qualified than the applicant who was hired. *Tr. 469; 471; 638-43.*

Throughout this seven month process (September, 1992, through March, 1993), neither of the Holts ever stated to JTM any concern about discrimination on the basis of age, nor retaliation for any alleged conduct they engaged in.

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[6] "[A]fter all is said and done still want out of Limestone and back to Georgia if possible said (sic) if anything opened up would keep me in mind." *DX-1 @ 38-39.*

They likewise filed no claim in their lawsuit that anything pertaining to the nepotism policy was discriminatory or retaliatory.

Following her departure from JTM, Mrs. Holt filed the subject Charge of Discrimination on or about May 10, 1993, at the Equal Employment Opportunity Commission office in Austin, Texas, with processing transferred from the EEOC to the Texas Commission on Human Rights ("TCHR"). The TCHR notification to JTM about the Charge was addressed to the Limestone Facility, at a time while Mr. Holt was still the Plant Manager. As a result, he received the TCHR envelope at the office in May, 1993, in his capacity as JTM's representative. *Tr. 146-47; 201-02.*

As highlighted by the colloquy set forth below between Mr. Holt and his lawyer at trial, without opening or reviewing the contents of the TCHR envelope, nor disclosing to upper management to what the contents of the envelope pertained, Mr. Holt forwarded the envelope to JTM's headquarters in Kennesaw, Georgia:

"Q Okay. Do you remember how it was that you forwarded the notice from the Texas Commission on Human Rights to JTM about the complaint filed by your wife? Did you mail it, is that what you did?

A It went through the mail. Whether I mailed it overnight or not, I don't know, but it did go through the mail.

Q Okay. And you didn't know what was in it, I take it?

A I assumed what was in it. I didn't read it. I didn't

know.

Q It was addressed to the JTM-Limestone Facility?

A Yes, sir.

Q And at that point you were still in charge of Limestone facility?

A Yes, sir."

Tr. 201-02 (Emphasis Added).

Thus, Mr. Holt introduced no evidence at trial to demonstrate that persons at JTM in positions of authority had specific knowledge of the Charge prior to the events of June 7, 1993, much less retaliated against Mr. Holt because of the filing of the Charge.[7] *Tr. 209; 211.* Also, Mr. Holt presented no anecdotal or statistical evidence to demonstrate any pattern of retaliatory conduct or retaliatory policies enacted or enforced by JTM or USPCI, nor any instances of retaliatory comments.

EVIDENCE PERTAINING TO RETALIATION CLAIM

During the presentation of the Holts' case-in-chief,

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[7] Mr. Fletcher, Mr. Kinder and Mr. Anderson, the three JTM executives directly involved with Mr. Holt during the period of his re-assignment, all testified unequivocally at trial that at the time of Mr. Holt's re-assignment on June 7, 1993, none of them knew about Mrs. Holt's filing of the Charge, most likely because the information about the Charge would have been forwarded by JTM staff in Georgia directly to Deborah Estrin, the USPCI Director of Human Resources in Houston. *Tr. 543-44; 556-57; 767; 788-90.*

only Mr. Holt testified about the subject of retaliation, and his testimony is set forth below. The crux of the evidence on Mr. Holt's failure to engage in ADEA "protected conduct" is his admission at trial that he did not in any way participate in anything pertaining to the Charge or the claims of discrimination set forth in the Charge. *Tr. 147; 432.* He merely testified that he was "aware" that his wife was going to file the Charge. He took no action other than receiving an envelope for the company and forwarding it elsewhere, as demonstrated by the following colloquy, which is the entirety of the evidence on this matter:

"Q All right, sir. At the time Mrs. Holt's employment was terminated on March 31st, 1993 then you were the Plant Manager?

A Yes, sir, I was Plant Manager.

Q And she was reporting directly to you?

A Yes, sir.

Q Were you aware that Mrs. Holt was going to file a complaint with the State of Texas alleging discrimination in the termination of her employment?

A Was I aware of it?

Q Yes, sir.

A Like on the 31st?

Q Yes, sir.

A No, sir.

Q When did you become aware of it?

A Probably a day or two before she filed (she filed on or about May 10, 1993).

Q She told you she was going to?

A She told me she was going to Austin.

Tr. 147 (Explanatory Comment Added).

There was, therefore, no evidence of Mr. Holt's having engaged in any statutorily protected conduct. He did not oppose any practice proscribed by the ADEA, nor did he make a charge, testify, assist, or participate in any manner in an investigation, proceeding, or litigation under the ADEA.

EVENTS FROM JUNE 7 UNTIL MR. HOLT'S DEPARTURE FROM JTM INDUSTRIES

The Petition misleadingly discusses the circumstances of the change in Mr. Holt's employment status with the company, and ignores or downplays the substantial efforts undertaken by the company to rehabilitate his status. Viewed in the proper context, the evidence demonstrates that JTM was confronted by Mr. Holt's stubborn resistance to management requests for improved performance, his complaints about the company to its primary customer, his failure to maintain vehicles properly, and his efforts to sabotage the company's contract with its primary customer. Because of this situation, the company placed Mr. Holt on

an administrative leave at the same rate of pay and benefits he was then receiving as Plant Manager.[8]

The Petition seeks to deflate the mendacity and antipathy of Mr. Holt's actions by focusing upon the company's decision not to terminate Mr. Holt's employment immediately. As Mr. Fletcher, the President of the company, emphasized at trial, the company recognized that Mr. Holt was incapable of managing a plant in conformity with management's directives, but the company nevertheless made efforts to give Mr. Holt one more chance, in view of his long tenure with the company and his background in ash disposal. *Tr. 767-70.*

Contrary to the assertions in the Petition, Mr. Holt admitted at trial that he was provided specific reasons why he had been placed on leave, and that no mention of the Charge was made during that meeting. *DX-1 @ 41.* He was also told that the proposal being made to him would be re-assignment to JTM's Kennesaw headquarters at his same rate of pay and benefits. *Tr. 149-50; 204-09; 230-31.* The proposal made to Mr. Holt included the company's agreement to sell or re-purchase Mr. Holt's Texas home, and to pay his family's moving expenses to Georgia. *Tr. 211-12; 770-71.* Mr. Holt accepted this proposal in writing a few days later, and coordinated a househunting trip to Atlanta at company expense. *Tr. 150; 154; 208; 215-16; 229; 543-45;*

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[8] The deleterious impact of Mr. Holt's involvement in managing the Limestone Facility on the morale of plant employees was likewise demonstrated at the trial uncontrovertedly by witnesses who continued supervising plant employees after his departure. Both of them described the significant upturn in morale at the Facility effected by Mr. Holt's departure. *Tr. 518-19; 591.*

557; DX-42.

Contrary to the assertions in the Petition, Mr. Holt contacted Mr. Kinder about reporting for work at the new assignment, and then reported for his first two weeks of work. *Tr. 217.* However, at the end of July, without warning, Mr. Holt refused to report for work and became incommunicado. *Tr. 552-53.* He did not notify the company of reasons for his disappearance, but merely refused to report. When Mr. Holt persisted in refusing to report for work, he was notified in writing that the company was treating such a refusal as a "resignation". At all times during the period from June 7, 1993, to mid-August, 1993, Mr. Holt received the same pay and benefits he was receiving prior to being placed on administrative leave. *Tr. 218-19; 238.*

PROCEEDINGS IN THE COURTS BELOW

As stated in the Petition, the Holts filed their Original Complaint in the Waco Federal District Court on or about December 28, 1993. Petitioner now implicitly communicates to this Court that he had ironclad proof, or at least some evidence, of retaliatory conduct by JTM. This is incorrect, and was vigorously contested by JTM before the Fifth Circuit.[9]

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[9] In fact, this fundamental defect in Mr. Holt's case has persisted throughout this litigation. In the ruling denying JTM's motion for summary judgment as to Mr. Holt's retaliation claim, the District Court noted: "While Plaintiffs present nothing to indicate that anyone involved in the employment decisions had actual knowledge that an EEOC claim had been filed by Mrs. Holt, it is hard to conceive that Plaintiff cannot establish some evidence of that at trial." *R. 717.* As is demonstrated herein, no such evidence was forthcoming.

As stated above, only Frank Holt testified on the subject of alleged retaliation, and his only testimony was to the proximity between the date he forwarded the TCHR envelope to JTM in May, 1993, and the date he was placed on administrative leave, June 7.

At the conclusion of the evidence, JTM and USPCI renewed their motion for judgment as a matter of law. The Court announced that it was declining to submit any issues for the jury to answer regarding any claims as to USPCI, in essence dismissing all claims against it. *Tr. 807.* The Court then conducted a hearing on the proposed Charge to the jury, and returned to the subject of retaliation. *Tr. 807-26.* The Court ultimately permitted the claim of retaliation to be submitted to the jury, but specifically included in the Charge only language about alleged retaliation under the ADEA, not under Title VII. *Tr. 833-37; 840.* Mr. Holt did not object to this charge as worded nor ask for inclusion of a retaliation claim under Title VII. The Charge, as finally prepared, omitted any reference to retaliation under Title VII.

Following entry of judgment, JTM timely filed its Notice of Appeal. Neither Plaintiff appealed the ruling of the District Court dismissing all claims against USPCI; Mrs. Holt did not appeal the dismissal of her claims; Mr. Holt did not appeal the dismissal of his substantive age discrimination claim or his state law claims; Mr. Holt did not appeal the District Court's exclusion of any claim of retaliation under Title VII. The proceedings before the Court of Appeals are otherwise identified correctly in the Petition.

PROPRIETY OF DENYING THE WRIT

PROPER STATEMENT OF THE ISSUE PRESENTED

It begs the question to posit, as the Petition does in Issue No. 1, whether the ADEA prohibits certain employer actions described as "retaliatory". The answer to that question is, clearly, yes, the ADEA prohibits retaliation, but only retaliation visited upon those persons who comply with the requirements of Section 623(d). The same comment holds for Petitioner's Issue No. 2.

Rather, the seminal question presented by this Petition is: Can an individual, whose relative has filed a charge of age discrimination, sue for ADEA retaliation when he or she has not engaged in a course of conduct, or even discrete acts, that are protected by Section 623(d)?

"STANDING" VS. "FAILURE TO STATE A CLAIM"

Before Congress enacted the ADEA in 1967, no private cause of action existed for alleged retaliation against an individual because of his or her involvement in opposing age discrimination against others or in aiding a third party who sought to combat alleged age discrimination in employment. By enacting *29 U.S.C. § 623(d)*, Congress explicitly created such a cause of action, stating that persons who were not themselves alleging age discrimination[10] nevertheless could bring a claim for retaliation.

On one condition.

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[10] Mr. Holt in this case did sue over alleged age discrimination directed at him.

They had to engage in some form of protected conduct to have standing to sue.

The Petition criticizes the Fifth Circuit's ruling in this case for characterizing the issue as one of "standing". The Petition suggests that a more appropriate analysis results from transforming the inquiry into a "Failure to State a Claim" inquiry in accordance with the analytical approach adopted by certain other courts. Petition at 13, n. 2. Contrary to Petitioner's assertions, this transformation does not endow the Petition with constitutional force.

Using a "Failure to State a Claim" analysis only obscures clear evaluation: in this case, there is no worthy claimant seeking redress because he was somehow denied a day in court as the result of defective pleadings. To the contrary, Mr. Holt participated in a four-day trial, and called six witnesses to the stand, including himself. He had ample opportunity before trial to discover,[11] and ample opportunity at trial to submit, competent evidence to the Court about

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[11] During pre-trial proceedings, the Holts initiated and conducted six (6) depositions, including two, on two separate occasions, at Kennesaw, Georgia; and two, on two separate occasions, in Houston, Texas. *R. 887, 894, 896, 900, 911, 913.* Their counsel also travelled from Waco, Texas, to Kennesaw, Georgia a third time to review at the JTM Industries corporate headquarters corporate documents responsive to a request for production of documents.

Thus, Plaintiffs' counsel undertook three separate trips to Kennesaw, Georgia, and two trips to Houston, but never sought any information pertinent to the retaliation claim -- either as to Mr. Holt's conduct or as to any involvement of JTM Industries' personnel in Kennesaw or USPCI personnel in Houston pertaining to receiving, reviewing, processing or disseminating information about the Charge. Further, the Holts never attempted to obtain any governmental agency records concerning the processing of the Charge or notifications to JTM Industries. *R. 937.*

his claims. He and his wife chose to concentrate their efforts, not on proving retaliation, but on proving claims of age discrimination *vel non*.

In calibrating correctly the boundaries of statutory eligibility, focusing upon the label used to appraise the viability of a cause of action is no substitute for scrutinizing the statute to delimit the universe of possible claimants.[12] Section 623(d) clearly establishes the boundaries:

> " It shall be unlawful for an employer to discriminate against any of his employees . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation under this chapter."

29 U.S.C. § 623(d).

The leading Fifth Circuit case on the framework of an ADEA retaliation claim, *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 267 (5th Cir. 1994), states unexceptionally that against this statutory backdrop, an employee's proof of a circumstantial case of unlawful retaliation commences by his proving: (1) that he engaged in activity protected by the ADEA; (2) that an adverse employment decision occurred; and (3) that there was a causal connection between the protected act and the adverse employment

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[12] Congressional enactment of a new cause of action carries with it a description of the duty imposed, the injury protected, and the persons who are entitled to enforce it. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1513 (9th Cir. 1992).

decision. 14 F.3d at 267.[13]

The inaugural hurdle on an ADEA retaliation claimant's path of proof is, thus, whether he engaged in activity protected by the ADEA. Regardless of whether he pleads this properly at the outset, demonstrates it adequately under FED.R.CIV.P. 56(e) to survive a pre-trial motion for summary judgment, or proves it by competent evidence in a courtroom before a trier of fact -- he still has to prove it. If he does not prove it, he cannot prevail.

Mr. Holt failed to prove this elemental fact.

The Fifth Circuit's determination that this failure of proof should be called a lack of "standing" is merely a way of classifying this particular claimant outside the bounds of the universe of permitted claimants.

Petitioner invokes considerations of Article III jurisprudence to support the worthiness of the Petition. Petition at 19-20 *citing Warth v. Seldin*, 422 U.S. 490 (1975); *Flast v. Cohen*, 392 U.S. 83 (1968); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). He also postulates that because the ADEA permits "any person aggrieved" to bring a civil action, *29 U.S.C. § 626(c)(1)*, that such a prudential consideration satisfies Article III. He therefore concludes that any plaintiff who satisfies Article III

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[13] This same test is articulated by the United States Court of Appeals for the Sixth Circuit in a case cited and relied upon heavily by Petitioner in this case. *See E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993), *citing Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir.), *cert. denied*, 478 U.S. 1006 (1984).

requirements has standing to assert a cause of action under the ADEA.

With all due respect to Petitioner, this analysis turns the concept of "standing" on its head and, if followed to its logical conclusion, would permit any employee, at any time, to sue an employer for any "actual or threatened injury" traced to the conduct of the employer, simply because the employee somehow felt aggrieved by a particular employment decision or practice.

This Court's Article III constraints on the jurisdiction of federal courts to decide cases or controversies is frankly independent of the issue presented in this case. This case does not involve a question of constitutional dimensions. This Court in cases like *Trafficante* and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), determined whether Congress could define a class of persons with standing to sue within the limits of Article III.[14] The gist of those cases, and the related case of *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979), is that when Congress by legislation establishes a cause of action, it is constrained in doing so by the limits of Article III.[15]

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[14] In *Havens Realty*, this Court held that the wording of section 804(d) of the Fair Housing Act, *42 U.S.C. § 3604(d)*, permitted a suit for housing discrimination by "testers" (those having no intention of seeking housing) motivated solely by a desire to combat racial steering, because Congress had conferred such a right upon them, the right "to truthful information about available housing." 455 U.S. at 373.

[15] "Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' *Warth v. Seldin, supra*, at 501, 45 L.Ed.2d 343, 95 S.Ct. 2197.

(continued...)

In the present case, Congress has chosen to identify a class of persons with standing to sue which is narrower than the limits demarked by Article III, in that the wording of Section 623(d) does not describe all employees, but only those employees who engage in statutorily protected conduct. Congress has exercised such power before, as when it responded to this Court's decision in *Martin v. Wilks*, 490 U.S. 755 (1989), by enacting Section 108 of the 1991 Civil Rights Act, codified at *42 U.S.C. § 2000e-2(n)*, effectively narrowing the universe of persons (otherwise authorized by *Martin v. Wilks* to sue) who could lodge challenges to employment discrimination consent decrees. Indeed, if Congress had wanted to include persons like Mr. Holt within the universe of anti-retaliation claimants eligible to sue under Section 623(d), it could easily have done so.[16] That it has not done so is of no constitutional moment.

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[15](...continued)

In no event, however, may Congress abrogate the Article III minima[.]" *Gladstone, supra*, 441 U.S. at 100.

As pointed out also by then Associate Justice Rehnquist in his dissent in *Gladstone*, the right to sue authorized by the majority pursuant to the provisions of the Fair Housing Act would not correspondingly exist pursuant to *42 U.S.C. § 1982* because, given the wording of Section 1982, the respondents there at bar could not have been eligible to sue. *Gladstone, supra*, 441 U.S. at 128-29 (Rehnquist, J., dissenting) *citing Warth v. Seldin, supra*, 422 U.S. at 512-14 ("Plaintiffs' attempt to raise putative rights of third parties barred by the prudential rules of standing").

[16] Congress created just such an expanded universe of claimants when it enacted the Americans with Disabilities Act, *42 U.S.C. §§ 12101 et seq.* ("ADA"), affording statutory protection and a cause of action to "qualified individuals with a disability" -- a term defined to include not only persons who are actually "disabled" but also persons who are perceived as "disabled". *42 U.S.C. § 12102(2)(C)*.

Petitioner is not an outsider seeking to conduct a public protest over the employment practices of a public employer, nor a person seeking to pursue some agenda of public interest to redress the deleterious impact of employment discrimination upon a community. He is an employee, who became a "former" employee of his own volition according to the evidence, who now complains about treatment allegedly levied specifically against him by his employer.

The issue is not whether the Constitution would tolerate such a claim in federal court; the issue is whether such a claim even exists, and whether Mr. Holt has been congressionally cloaked with the exclusive status to lodge such a claim.

NO SIGNIFICANT CONFLICT AMONG THE CIRCUITS EXISTS MERITING THIS COURT'S REVIEW

Viewed in this context, Petitioner's alleged conflict among the Circuits shrivels.

In *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993), a case relied upon heavily by Petitioner, the anti-retaliation claimant was an African-American protesting racial discrimination under Title VII who had already filed a charge of discrimination with the EEOC over his discharge. The employer thereafter offered to reinstatement him. 7 F.3d at 542. However, at a meeting to discuss this offer, the employer withdrew the offer after a "representative of the claimant" mentioned several incidents of allegedly discriminatory treatment in favor of Caucasian employees. 7 F.3d at 542. As the Fifth Circuit correctly opined in the case now before this Court, the *Ohio Edison* decision is

distinguishable[17] and does not conflict with *Holt* because a representative of the employee had opposed a discriminatory employment practice, a crucial event absent from these proceedings. 89 F.3d at 1227, n.2.[18]

Petitioner's citation to *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), likewise does not present an example of a true conflict. Mr. and Mrs. Wu were university professors. Mrs. Wu complained about equal pay and gender discrimination. 863 F.2d at 1545. She filed a charge with the

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[17] Interestingly, the decision by the United States Court of Appeals for the Seventh Circuit, *McDonnell v. Cisneros*, 84 F.3d 542 (7th Cir. 1996), cited by Petitioner in support of his position on page 15 of the Petition, characterized the Sixth Circuit's *E.E.O.C. v. Ohio Edison* decision as a case involving "active opposition" by the anti-retaliation claimant. 84 F.3d at 262.

[18] The *Ohio Edison* Court, 7 F.3d at 544, n.1, does proceed to cite district court cases relied upon by this Petitioner that discuss mere status as conferring standing to sue, including *DeMedina v. Reinhardt*, 444 F.Supp. 573 (D.D.C. 1978), *aff'd in part and remanded in part*, 686 F.2d 997 (D.C. Cir. 1982); *Clark v. R.J. Reynolds Tobacco Co.*, _____ F.Supp. _____, 27 FEP 1628, 1982 WL 2277 (E.D.La.1982)[a decision now overruled by the Fifth Circuit's ruling in this case]; *United States v. City of Socorro*, _____ F.Supp. _____, 25 FEP 815, 1976 WL 523 (D.N.M. 1976); *Kornbluh v. Stearns & Foster Co.*, 73 F.R.D. 307 (S.D. Ohio 1976); and *Mandia v. Arco Chemical Co.*, 618 F.Supp. 1248 (W.D. Pa. 1985).

However, the Sixth Circuit's analysis of the issue presented demonstrates that it addressed a factually different situation. After rejecting the EEOC's statement of the issue (that Title VII prohibits employers from discriminating against any and all third parties in retaliation for a co-employee's protected activity without establishing any causal link between the two) and the employer's statement of the issue (Title VII only prohibits acts of retaliation against the person actually engaged in the protected activity), the Sixth Circuit stated that the true issue was whether an employee could claim retaliation "when he has asked another employee to act on his behalf in protesting allegedly discriminatory practices". 7 F.3d at 543.

EEOC and ultimately sued. Three and a half years later, when Mr. Wu (also a professor) was removed as chairman of his department, Mrs. Wu filed a second charge with the EEOC, claiming retaliation against her for this action against her husband.[19] The specific language she used in her second charge, as quoted by the Eleventh Circuit, was: "The University retaliated against me by [Dr. John Formby] calling my husband and suggesting that he would be happier teaching somewhere else." 863 F.2d at 1547 (Emphasis Added).

The EEOC issued a no cause determination on the second charge in January, 1987. 863 F.2d at 1546. Both Mr. and Mrs. Wu filed suit thereafter. According to the Eleventh Circuit, this second lawsuit alleged unlawful retaliation "against H.K. and Kathleen Wu for bringing *Wu I*." 863 F.2d at 1546 (Emphasis Added). The Eleventh Circuit permitted Mr. Wu to participate as a plaintiff, even though he had not filed a charge with the EEOC himself, because it concluded that the filing of an additional charge by Mr. Wu was unnecessary under the circumstances. 863 F.2d at 1548. The *Wu* Court went on to hold that the district court erred in treating Mrs. Wu's retaliation claim as having been subsumed by her discrimination claim for estoppel purposes, and reversed a summary judgment on that basis.

There is, thus, no discussion in that case of the right of a person, merely because of marital status, to bring an action solely because of alleged adverse treatment of that

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[19] The district court conducted a bench trial of the original claims in early 1986, before the EEOC completed its investigation of this second (anti-retaliation) charge. 863 F.2d at 1545.

person's spouse. *Wu v. Thomas* is therefore inapposite, and does not conflict with the holding by the Fifth Circuit in *Holt*.

The Seventh Circuit decision in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), also referred to by Petitioner, is likewise distinguishable. The Court there discusses, in *dicta*, the scope of Title VII's anti-retaliation provision, but the case specifically involved a claim of retaliation asserted by a supervisor who alleged that he was retaliated against for failing to prevent certain female employees under his supervision from filing complaints of sex discrimination with the EEOC. Calling this "passive" rather than "active" opposition to alleged discriminatory practices, the Seventh Circuit concluded that the anti-retaliation claimant's complaint should not have been dismissed. 84 F.3d at 262. It chose, however, to characterize what this claimant had done as "passive resistance", which it found actionable. It clearly did not recognize that a cause of action existed for someone merely because of his relation to an alleged aggrieved party, but rather because of the allegation that he himself had engaged in conduct to assist other persons to lodge discrimination charges -- in a manner which the Seventh Circuit called "a time-honored form of opposition". *Id.*[20]

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[20] Petitioner apparently reads the *McDonnell* decision as ratifying an expansion of the universe of potential claimants under the ADEA by reversing the focus from overt, active, statutorily protected conduct by the claimant to a diametrically opposite focus upon what the employer allegedly thinks of the claimant, or more particularly, what the employer presumes the claimant's attitude to be about the employer's employment practices, such that this presumption by the employer, not the conduct by the claimant, justifies broadening of the statutory scope of Section 623(d).

(continued...)

The decision by the Fifth Circuit in *Holt* does appear to conflict with the EEOC regulations and interpretations cited by Petitioner on page 15 of the Petition. However, the underlying premise of the EEOC's position -- essentially that Title VII prohibits employers from discriminating against any and all third parties in retaliation for a co-employee's protected activity without establishing any causal link between the two -- was examined and rejected by the Sixth Circuit in *Ohio Edison*. 7 F.3d at 542.

COURT OF APPEALS' RULING DOES NOT DIMINISH STATUTORY RIGHTS

Petitioner asserts that the Fifth Circuit's interpretation in this case "produces absurd and unjust results", specifically, that an employer could deter an individual who wanted to exercise his own rights under the ADEA by threatening retaliation against a spouse or family member also employed by the company. No such threat occurred in this case. Indeed, Mrs. Holt had departed the company before lodging her Charge. There is absolutely no evidence that she had any contact with anyone at JTM about filing a Charge before she left; nor is there any evidence of any interaction on this subject initiated by either of the Holts or by anyone at JTM in the seven-month period between announcement of the nepotism policy and conclusion of Mrs. Holt's employment.

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[20](...continued)

Respondent respectfully contends that the decision by the Fifth Circuit in the case at bar is truer to the plain meaning of the words of Section 623(d) and, in this context, correctly interprets Section 623(d) without need for further review by this Court.

Beyond that, the conjectured fear of deterrence which Petitioner posits hypothetically dissipates in the face of the reality that statutorily protected "participation or assistance" can, by their very nature, be concealed from the employer. In this case, for example, if Mr. Holt had secretly accompanied Mrs. Holt to Austin to aid her in filing the Charge with the EEOC, and had filled out an EEOC affidavit or statement in support of the Charge at that time, the company may never have known of such conduct. Mr. Holt had only to prove that he expressly opposed certain treatment that he considered discriminatory; or that he "testified, assisted, or participated in any manner" in the filing or investigation of the Charge to have come within the boundaries of ADEA protected conduct. As noted by the Fifth Circuit in this case, the broad wording of Section 623(d) more than adequately protects legitimate claimants who engage in even *de minimis* conduct identified as protected by the statute.

COURT OF APPEALS AVOIDED JUDICIAL LEGISLATING

As this Court recently reiterated, the first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. *Robinson v. Shell Oil Co.*, ___ U.S. ___, 136 L.Ed.2d 808, 813, 117 S.Ct. 843 (Feb. 18, 1997), *citing United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989). The Fifth Circuit made that determination in its opinion in this case, wisely avoiding deviation from the plain wording of Section 623(d). It declined the temptation to legislate through judicial legerde-

main an amendment to Section 623(d).[21] It chose, instead, to enforce the clearly worded statute as written, 89 F.3d at 1227, to avoid precisely those situations where non-actors who admire or support a co-worker's protest against discrimination could also compel a company to incur the significant legal fees and resources necessary to respond to, or defend against, invisible protests.

CONCLUSION

The Court of Appeals correctly decided the controversy presented to it. The failure of proof, which is evident in this case, is solely the fault of the Petitioner and no one else. This Court should deny the petition for writ of certiorari.

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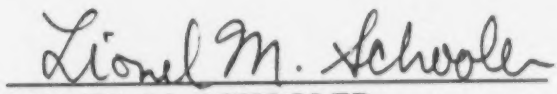
[21] The Fifth Circuit has already interpreted Title VII broadly enough to permit a claimant to oppose employment practices which may not be discriminatory but which the claimant nevertheless "reasonably believes" are unlawful. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140-41 (5th Cir. 1981).

PRAYER

RESPONDENT JTM INDUSTRIES, INC. therefore prays that the Petition for Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED,



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